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No. 91-324

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the courts below acted well within their equitable discretion to modify a desegregation plan, the scope of which this Court has declined to review, by assuring that as part of capital improvements necessary to make schools sufficiently safe, healthy and suitable for desegregation programs asbestos hazards would be abated to the extent required by federal law.

2. Whether the courts below similarly acted well within their equitable discretion to modify the desegregation plan by adjusting the budget required for the construction of a single high school, where the record at an evidentiary hearing demonstrated that errors in the original budget estimate, and new information about the actual costs of construction, necessitated a revised budget.

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT [1]

COUNTERSTATEMENT OF THE CASE

A. Liability and Initial Remedy Proceedings.

After a 92-day trial on interdistrict and intradistrict desegregation claims brought by the Jenkins plaintiff class of schoolchildren and the Kansas City, Missouri School District ("KCMSD"),[2] on September 17, 1984 the district court (The Honorable Russell G. Clark) found that "[t]he people of the State of Missouri through con-

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[1] The Kansas City, Missouri School District respondents include the school district itself and its Superintendent.

[2] The KCMSD originally filed the complaint in 1977 against State of Missouri defendants and a group of surrounding school districts. The KCMSD was re-aligned as a defendant and separate counsel was retained to represent the plaintiff schoolchildren. Trial proceeded both on the claims of the Jenkins plaintiff class and KCMSD's cross-claims against the State. The district court granted the motions to dismiss of the surrounding school districts on June 5, 1984.

stitutional provision and the General Assembly through legislative enactments mandated that all schools for blacks and whites in th[e] State were to be separate" in violation of the Fourteenth Amendment, and that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." *Jenkins v. Missouri*, 593 F. Supp. 1485, 1503-04, 1492 (W.D. Mo. 1984). With these liability findings, uncontested by the State, the parties and district court began the development of the remedy for this violation.

The State and the KCMSD submitted proposed desegregation plans, and Judge Clark held two weeks of hearings that resulted in his initial remedial order of June 14, 1985. The plan adopted by the district court had four key components designed both to achieve actual desegregation and to restore the black schoolchildren who were the victims of segregation to the position they would have occupied in the absence of discriminatory conduct. First, Judge Clark approved educational programs "designed to increase student achievement" because segregation had "caused a systemwide *reduction* in student achievement in the schools of the KCMSD." *Jenkins v. Missouri*, 639 F. Supp. 19, 25, 24 (W.D. Mo. 1985) (emphasis in original), *aff'd*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). KCMSD, the plaintiff schoolchildren, and the State all had supported inclusion of educational components in the remedy. *Jenkins*, 639 F. Supp. at 24.

The second remedial component approved by the court was the use of magnet schools to draw new non-minority enrollment to the KCMSD, to encourage voluntary desegregative transfers within the school district, and to make better educational opportunities available to minority as well as non-minority students in the district. *Id.* at 34. Judge Clark specifically found that magnet schools which would draw a voluntarily desegregated enrollment based on a special theme or method of teach-

ing held better promise of achieving actual desegregation than the State's preferred method of mandatory student reassignment and busing, which would "only serve to increase the instability of the KCMSD and reduce the potential for desegregation." *Id.* at 38. As a third component of the remedy, Judge Clark ordered the State to seek the active cooperation of surrounding school districts in a voluntary interdistrict transfer program. *Id.* at 38-39. The voluntary enrollment of non-minority students from area districts in KCMSD magnet schools, and the opening of opportunities for minority students from KCMSD to attend integrated suburban schools, was found by the district court to be an appropriate remedial component because of the difficulty of desegregating the KCMSD, which had become nearly 70 percent black and had an enrollment of 90 percent or more black in 25 of its 66 schools. *Id.* at 39, 36. That component of the remedy, and the remedial goal of attracting non-minority students from outside the KCMSD back to its magnet schools on a voluntary basis, also was responsive to the district court's findings that "segregated schools, a constitutional violation, ha[ve] led to white flight from the KCMSD to suburban districts, large number[s] of students leaving the schools of Kansas City and attending private schools and that . . . has caused a system wide reduction in student achievement in the schools of KCMSD." Aug. 25, 1986 Order at 1-2.[3]

The court also approved as a fourth component of the remedy a program of capital improvements, because "[t]he current condition of the . . . school facilities

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[3] The State's Petition contends that "the plaintiffs . . . proved neither an interdistrict violation nor an interdistrict effect." Pet. at 4. The respects in which the remedy provides for voluntary interdistrict desegregation are fully supported by Judge Clark's orders, including the August 25, 1986 Order quoted in text, and by the extensive evidence presented in the liability case that the violation had significant interdistrict aspects. That evidence is described in the Brief in Opposition of Respondents Kalima Jenkins, *et al.*, at the Counter-Statement of the Case.

adversely affects the learning environment and serves to discourage parents who might otherwise enroll their children in the KCMSD . . . ." 639 F. Supp. at 39. Judge Clark recounted the evidence of "safety and health hazards, educational environment impairments, functional impairments, and appearance impairments" in the schools, *id.*, and concluded that "improvement of school facilities is an important factor in the overall success of this desegregation plan." *Id.* at 40.

On cross appeals to the United States Court of Appeals for the Eighth Circuit, KCMSD and the Jenkins plaintiffs argued that the district court erred in the legal standard that it applied to dismiss the surrounding suburban school districts, while the State questioned "what the vestiges of th[e] dual school system are 30 years after it was declared void and what constitutes a proper remedy to eliminate those vestiges." Brief of State Appellees/Cross Appellants at 40 (No. 85-1765WM, *et al.*) (filed Sept. 23, 1985). The State also attacked some components of the remedy, particularly components for which the district court set funding allocations that required most of the cost to be paid by the State.[4] With regard to the voluntary interdistrict transfer plan, the State argued "that an order requiring support of an exchange program between numerous school districts, based solely upon a violation in one of those districts, imposes an interdistrict remedy for an intradistrict violation." *Id.* at 54.

The Eighth Circuit affirmed the dismissal of the surrounding school districts and made modest alterations in the allocation of funding for the remedy, but affirmed

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[4] As the Eighth Circuit observed, "[n]o one challenge[d] the substantial portion [of the remedy] in which the costs are divided evenly between the State and the KCMSD." *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). Those portions of the remedy included most of the components designed to improve educational achievement and the holding that magnet schools would be the basis in the remedy for student reassignment.

the inclusion of a voluntary interdistrict transfer component and capital facilities improvements in the remedy. The Eighth Circuit specifically held that an interdistrict transfer plan, on a voluntary basis, is an appropriate part of a remedy where liability against the State has been established because such transfers would assist in the achievement of desegregation *within* the KCMSD. *Jenkins*, 807 F.2d at 683-84. The court reiterated, however, that a mandatory interdistrict remedy (such as consolidation of school districts or mandatory assignment of students across school district lines) would be outside the scope of the violation found by the district court and thus beyond the district court's power. *Id.* at 683 n.30. With respect to capital facilities, the Eighth Circuit further held that the district court's findings of hazards in the schools that impede attraction of students and obstruct the success of the educational programs included in the remedy were "sufficient to support its conclusion that capital improvements are necessary for successful desegregation." *Id.* at 685. The court went on, however, to reallocate funding responsibility for capital improvements on an equal basis between the State and the KCMSD, rather than requiring the State to pay most of the cost. *Id.*

The KCMSD and Jenkins plaintiffs petitioned this Court for a writ of certiorari to review the legal basis of the Eighth Circuit's affirmance of the dismissal of the surrounding school districts. This Court denied certiorari. 484 U.S. 816 (1987). No cross-petition was filed by the State on the scope of remedy issues it raised in the Eighth Circuit. The order setting the initial scope of the remedy, with the modest modifications made by the Eighth Circuit, thus became the law of the case. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). Because no party had sought a stay of implementation during the pendency of the proceedings, the implementation of the remedy began at the start of the 1985-86 school year.

Over the six years since the implementation of the remedy began, the district court has entered numerous orders clarifying, renewing, or setting specific parameters on the remedial components. Of greatest note, on June 16, 1986, the district court approved for fall of 1986-87 the opening of an initial group of six magnet schools, and on November 12, 1986, ordered a Long-Range Magnet School Plan that was to be phased in over a six-year period. Each of these orders also provided for capital facility improvements to accommodate the special needs of the magnet school programs and to bring the schools up to an acceptable level of safety, health and appropriateness for educational programs. *Jenkins v. Missouri*, 639 F. Supp. 19, 53-55 (W.D. Mo. 1986), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989); *Jenkins v. Missouri* No. 77-0420-CV-W-4, slip op. at 4 (W.D. Mo. Nov. 12, 1986).

On September 15, 1987, the district court approved a Long-Range Capital Improvements Plan to implement a significant part of the remaining capital needs to make KCMSD schools sufficiently safe, healthy, comfortable and attractive for both the magnet school programs and for the desegregation educational programs. The court specifically found that KCMSD's "physical facilities have literally rotted" and that the "overall condition" of the schools remained "generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." *Jenkins v. Missouri*, 672 F. Supp. 400, 411, 403 (W.D. Mo. 1987), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989). The district court premised this order on two findings. First, the court found that the State's mandatory segregation had caused these "rott[ing]" physical conditions, since large numbers of white taxpayers with children, who previously had contributed to the majorities needed to pass levy increases and bond elections, left the district, thereby "prevent[ing] the KCMSD from raising funds to maintain its schools." 672 F. Supp. at

411, 403, citing November 12, 1986 Order at 4. Second, the court found that "a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is *crucial* to the overall success of the desegregation plan." *Id.* at 403 (emphasis added).

The State appealed these three orders to the Eighth Circuit, once again arguing strenuously that the orders exceeded the district court's equitable discretion because the State believed they went beyond the bounds of the violation that the district court found. Once again, the Eighth Circuit affirmed. *Jenkins v. Missouri*, 855 F.2d 1295, 1299-1300 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989). The Eighth Circuit based its affirmance on the principle that "the victims of unconstitutional segregation must be made whole, and . . . to make them whole it will be necessary to improve their educational opportunities and reduce their racial isolation." *Id.* at 1301. The court further affirmed the capital improvements plan, based on the district court's "findings" that the constitutional violations of "both KCMSD and the State had caused the decay of the KCMSD's buildings." *Id.* at 1300. The court recognized that "[t]he foundation of the plans adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools." *Id.* at 1301. The court went on to affirm as modified a procedure by which local property taxes could be raised to pay the KCMSD's share of the remedy that both it and the district court had found to be constitutionally required. *Id.* at 1308-15.

The State petitioned this Court for a writ of certiorari to review two questions presented by the Eighth Circuit's affirmance:

1. Whether a federal court, remedying an intradistrict violation under *Brown v. Board of Education*, 347 U.S. 483 (1954), may

a) impose a duty to attract additional non-minority students to a school district, and

b) require improvements to make the district schools comparable to those in surrounding districts.

2. Whether a federal court has the power under Article III, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on citizens of a local school district.

See 57 U.S.L.W. 3577 (Feb. 28, 1989) (No. 88-1150).

This Court granted the petition to review the second question only. 490 U.S. 1034 (1989). The decision on the merits, issued on April 18, 1990, addressed only the issue of whether the tax orders of the district court and the court of appeals exceeded their equitable and constitutional power. *Missouri v. Jenkins*, 495 U.S. 33, ——, 110 S. Ct. 1651, 1660 (1990) ("[w]e granted the State's petition, limited to the question of the property tax increase . . . ."). The magnet school and capital improvement orders thus have been in the process of implementation since the district court's orders were issued in 1986 and 1987.

B. The Orders at Issue.

The two particular orders at issue in the State's petition for certiorari are among a series of orders by the district court that have made modifications in the desegregation plan in the course of implementation, based on experience and further information that has become available.

1. *The Asbestos Order.*

The Long-Range Capital Improvements Plan and the earlier capital improvements ordered for the initial stages of the magnet school plan all contemplated that some asbestos abatement would be done as part of the renovation work at District schools. The district court originally so ordered because it held that "a school facility which

presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment." 639 F. Supp. at 40. In fact, the State's own proposed capital improvement plan, which the district court rejected because it was inadequate in other respects, acknowledged that asbestos abatement necessarily would have to be part of the desegregation-related work and provided budget estimates for that work.[5]

The cost of asbestos abatement was particularly difficult to specify with certainty in advance of each project. This is true because it generally cannot be known until a renovation project begins precisely where asbestos will be found and what means will be necessary to abate it. The record also shows that other desegregation-related capital improvement plan work, such as knocking out walls to enlarge learning spaces and opening walls to gain access to decrepit pipes and electrical wiring, has created a need for asbestos abatement that otherwise would not exist.[6]

Moreover, on October 30, 1987, the United States Environmental Protection Agency published final rules pursuant to the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), 15 U.S.C. §§ 2641-2654 (1988), establishing strict standards for maintaining environments free of asbestos hazards. The rules went into effect on December 14, 1987. 52 Fed. Reg. 41826 (Oct. 30, 1987). Thus the actual work done by KCMSD under the capital improvements plan had to comply with the new, stricter standards; the inspections originally conducted by the KCMSD for the presence of asbestos in its facilities and the less expensive methods KCMSD originally contem-

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[5] *See* State's Ex. 9, Tr. Vol. VI at 64 (Aug. 11, 1987).

[6] *See* Declaration of Don M. Powers, in support of KCMSD Motion for Increased Funding for CIP Asbestos Abatement Costs (filed Dec. 7, 1988), ¶ 3.

plated for handling asbestos abatement were no longer consistent with federal law.[7]

By late in 1988, the KCMSD had completed asbestos abatement work and knew the necessary costs for the first six magnet schools that had opened in the KCMSD. The KCMSD moved the district court for approval of the asbestos abatement costs in excess of its original estimates for those six schools—some $910,224—as a desegregation cost required to meet federal health and safety standards in regard to the work that remedying the constitutional violations required in the KCMSD's school buildings. It also sought court approval of the use of AHERA standards as an appropriate guideline for the KCMSD's future renovation of school buildings to make them available and suitable for desegregation programs.[8]

The State opposed the District's motion, contending that asbestos abatement is not a desegregation expense, but it produced no evidence challenging the facts that the renovations otherwise necessitated by the constitutional remedy in turn necessitated asbestos abatement for the health and safety of children in KCMSD schools.[9] The record showed, to the contrary, that the renovations required to remedy the violation would dislodge asbestos-containing materials, and once they did, AHERA would require a level of abatement as a matter of federal law that was more stringent than originally contemplated by the KCMSD when it prepared its estimated budgets for capital improvements. Although one of the State's major

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[7] *See* Declaration of Walter Houston, in support of KCMSD Motion for Increased Funding for CIP Asbestos Abatement Costs (filed Dec. 7, 1988), ¶ 3.

[8] The State's Petition at page 11 confuses the schools and amounts involved in the KCMSD's motion. The $910,224 increase was for the six schools in "Phase III" of the capital improvements plan; the Phase III increase requested was not in addition to the $910,224.

[9] *See* State's Response to KCMSD Motion for Increased Funding for CIP Asbestos Abatement Costs (filed Jan. 5, 1989).

arguments was that school districts generally have to comply with AHERA so the costs of compliance should not be a desegregation expense, it produced no evidence to counter the KCMSD's proof that the cost in the KCMSD was extraordinary *because* the asbestos-containing materials would not have been dislodged had the constitutional violations not required desegregation-related capital improvements work that the court ordered.[10]

The district court granted the KCMSD's motion, with some modifications in the requested allocation of costs between KCMSD and the State. The district court noted that the Eighth Circuit, in its affirmance of the scope of the capital improvements plan, already had anticipated that " 'the capital plan that we affirm today does not cover all expenditures that may be necessary between now and the 1991-92 school year [including some] asbestos removal costs.' " Pet. App. A-56, *quoting Jenkins*, 855 F.2d at 1306.[11]

On the State's appeal to the Eighth Circuit, that Court affirmed, citing the uncontested evidence that achieving an acceptable level of health and safety was an appropriate goal for capital improvements in a desegregation plan, that asbestos abatement was vital to health and safety, and that "the evidence in the record . . . differentiates this situation from situations found at other school districts, or for that matter any other public buildings" because "many asbestos-containing products that normally would pose no danger (such as flooring), become potentially dangerous when disturbed during the [court-ordered] renovation work" needed to remedy the constitutional violations. Pet. App. A-25.

The State sought no stay of the district court order pending appeal. The asbestos abatement work approved

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[10] *Id.*

[11] We cite the State's petition for writ of certiorari as "Pet."; the State's Appendix in support of its petition as "Pet. App."; and the Joint Appendix from the Eighth Circuit *Jenkins III* Appeal, No. 89-1838WM, reported at 855 F.2d 1295 (8th Cir. 1988) as "J.A."

for the six magnet schools has been done, and the $910,-224 budget increase for that work has been expended. In fact, the vast majority of asbestos abatement called for under the capital improvements plan is complete.

2. *The Central High School Order.*

When the Long-Range Magnet School Plan was proposed in 1986, Central High School was a virtually all-black school, located in the "central corridor" area of Kansas City which is heavily minority. J.A. 2477-78, 988-89. It was at that time in the worst physical condition of any KCMSD high school. J.A. 2388. Testimony during the Long-Range Magnet School Plan hearing demonstrated that water damage, falling plaster and ceiling tiles, worn out floors and peeling paint were prevalent throughout the school. Testimony of Dr. Richard Hunter, Volume II at 396-400 (Sept. 16, 1986). Dr. Hunter stated that one could "see daylight" through a hole in the auditorium's roof and "when it rains it just came directly into the auditorium. Very depressing conditions walking around the building and a very poor educational facility." *Id.* at 399-400.

Among the initial capital facility projects approved for magnet schools as part of the Long-Range Magnet School Plan order was the construction of a new Central High School. No party contested that a new building was necessary for reasons of safety, health, comfort and attractiveness for educational programs, and for the special facilities needed to implement at Central both the Computers Unlimited and Classical Greek magnet themes.[12] The approval of a new Central High School building thus became final with the Eighth Circuit's affirmance of the

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[12] The Computers Unlimited program offers computer-assisted instruction and specialized courses involving computer technology, while the Classical Greek program emphasizes development of "a sound mind and a sound body" by combining a vigorous liberal arts and classical studies curriculum with unique opportunities for athletic training and physical education, including a focus on Olympic events and activities. J.A. 596-98, 599-601.

November 12, 1986 Order, and this Court's denial of the State's petition for certiorari to review that affirmance.

As KCMSD developed the design for the new Central High School, it became clear that the budget approved by the courts below would not be adequate for the program requirements for the new facility. The budgets originally presented to the district court by the KCMSD were "based upon studied estimates" that the district court held could be "adjusted when the actual costs of the capital facilities work and the magnet school plan ordered by the Court are ascertained." November 12, 1986 Order at 6.

In September 1988, the KCMSD filed a motion asking the district court to increase the construction budget for Central to recognize the "actual costs" necessary for the construction. After extensive discovery, the district court held a three-day hearing. The court heard expert testimony by architects for both the KCMSD and the State, the KCMSD's construction project manager, and educators, parents and community members involved in the development of the programs at Central, or who contemplated sending their children to school there.

The district court approved the budget modification for the construction of the new Central High School, excluding the costs associated with a high diving tower.[13] Pet. App. A-46, A-50. The court carefully reviewed the basic reasons why the original budget was inadequate: 1) a flawed design assumption that certain enclosed athletic facilities could be located inside an indoor track; 2) an incorrect assumption about the appropriate design "efficiency ratio," or ratio of net program space to gross building space; and 3) the erroneous omission of archi-

[13] In the same order the district court approved a site for Central and a revision in the alignment of budget years and adjustment in the cost of equipment for the school. Pet. App. A-50–A-52. The State did not present evidence disputing those aspects of the Central project.

tects' and engineers' fees, soil survey and testing and bid advertising from the estimate. All of these issues were the subject of discovery and hearing testimony by expert architects and a construction manager. The court also carefully reviewed the extensive evidence that the facilities proposed by the KCMSD for Central, particularly the athletic facilities on which the court made findings on a room-by-room basis, were necessary for the magnet school theme. Pet. App. A-45-A-49. The State's own witness admitted, as the district court noted, that various facilities were appropriate to the program and would be attractive to a desegregated enrollment. Pet. App. A-46, A-47. The court specifically found that "[t]he magnet programs could not be successfully implemented in a lesser facility," and that "such facilities are necessary to attract non-minority suburban students to the inner city to accomplish the difficult task of desegregating Central High School." Pet. App. A-49. The court also reviewed the uncontested evidence that the KCMSD made efforts to remain within the original budgets, and that in the course of so doing eliminated certain art, athletic and music facilities from Central that also could be attractive but that were not essential to the program. Pet. App. A-49-A-50.

On an appeal taken by the State, the Eighth Circuit affirmed. That court rejected the State's argument that the district court exceeded its authority in modifying its earlier budget order for Central, because "a federal court has 'inherent jurisdiction in the exercise of its equitable discretion and subject to appropriate appellate review to vacate or modify its injunctions.'" Pet. App. A-32, *quoting Booker v. Special School Dist. No. 1*, 585 F.2d 347, 352 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979). The court recognized that the original order approved "studied estimates to be adjusted as actual costs were ascertained," and the district court's order demonstrated its careful consideration of the various facilities proposed within the school. Pet. App. A-33. In particular, the court pointed out that the State made no argument

that any of the district court's findings were "clearly erroneous." Pet. App. A-34; *see* Fed. R. Civ. P. 52(a). Applying this Court's standard in *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985), the court was "convinced that the district court did not clearly err in finding that the KCMSD's design process was appropriate, that the additions to the planned athletic facilities were justified, that the allocated space of 200 square feet per student is necessary to implement the magnet themes and enhance the school's attractiveness to non-minority students, and that the increased construction and equipment budgets are necessary to meet the design requirements." Pet. App. A-34.

Once again, no stay was sought or issued pending appeal. In fact, the new Central High School building was constructed and open to students on September 3, 1991. Nearly 200 non-minority students are now in the Central High School student body, resulting in a 17.5 percent non-minority racial composition. This is a significant change from the all-minority student body that Central had before it became a magnet school.

REASONS FOR DENYING THE WRIT

The decision which the State seeks to have this Court review presents highly fact-bound, narrow, and technical issues of the correct budget amounts for certain construction activities as part of a desegregation plan. It is extraordinary to contemplate the prospect of this Court delving into the intricacies of building efficiency ratios, the extent of appropriate asbestos abatement during school renovations and the like. No conflict among the circuits or important question of federal law is presented by why it costs more than originally anticipated in 1986 or 1987 to build a new Central High School in 1990 and 1991, or why it costs more to abate asbestos during school renovations after new federal regulations raised health and safety standards for that work. Under the "two-court rule," the extensive fact findings that supported the revised estimates should not be disturbed by this Court.

In any event, the issues the State asks the Court to review are moot, because Central High School is finished, and received its new student body on September 3, 1991. The asbestos work that was the subject of the $910,224 budget increase the State complains of has been performed. No decision of this Court could alter the scope of what has been done in these projects.

In apparent recognition that the orders actually at issue do not present questions worthy of the Court's review, the State invites the Court to take "a renewed opportunity to consider the scope of the ongoing school desegregation remedies ordered by the United States District Court for the Western District of Missouri for" the KCMSD. Pet. at 2. Such an invitation is inappropriate, because the Court already declined to review the magnet school and capital improvement plans affirmed in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989), and the State never even sought this Court's review of the basic structure of the remedy approved in *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). The remedy has been in implementation for years. All of the conversions to magnet schools called for in the initial six-year cycle of the plan have taken place; most of the capital improvements have occurred. It would be tremendously disruptive of a remedy that is off to a successful start for this Court to attempt now, in the context of far narrower issues, to review the reams of testimony, exhibits, other record evidence and fact findings that support the desegregation remedy in Kansas City.

I. REVIEW OF THE COST OF CENTRAL HIGH SCHOOL AND ASBESTOS ABATEMENT WOULD BE INAPPROPRIATE UNDER THIS COURT'S STANDARDS FOR GRANTING A PETITION FOR CERTIORARI

The actual issue before the courts below that culminated in the approval of a revised budget for Central High School and for asbestos abatement was limited to

ascertaining the appropriate and accurate cost of those projects. The court previously had found that a new Central High School to replace the segregation-scarred Central High School building was a necessary part of the desegregation plan. Indeed, the State in those earlier proceedings had offered no evidence contesting the need for a new Central High School as part of the desegregation plan, nor did it challenge that asbestos abatement had to be done in KCMSD school buildings to make them sufficiently safe and healthy for successful desegregation programs. Indeed, the State's own proposed desegregation plan component for capital improvements called for asbestos abatement as part of the renovation work.[14]

It is simply not the case that these increased budgets were ordered, as the State suggests, because it would be nice to have bigger, better, or fancier schools to attract non-minority enrollment. In the case of Central High School the actual stated reasons for the budget increase, in both the KCMSD's request and the district court's findings, are: 1) The budget needed to include items that originally were omitted erroneously such as architects' and engineers' fees, bid advertising, soils survey and testing, furniture and construction contingencies; 2) A 72 percent ratio of net to gross building space was more appropriate than the 85 percent ratio assumed in the original estimate; and 3) Certain athletic facilities could not properly be located inside an indoor running track. Pet. App. A-43, A-50. The asbestos budget increase was requested by the KCMSD, and affirmed by the Eighth Circuit, based on "uncontested evidence . . . that asbestos was found in existing buildings during the court-ordered renovation, and that many asbestos-containing products that normally would pose no danger (such as flooring), became potentially dangerous when disturbed during the renovation work,"—factors which "differentiate[ ] this situation from situations found at other school districts,

[14] *See* note 5, *supra*.

or for that matter any other public buildings." Pet. App. A-25.

Because these findings of fact were reviewed by two lower courts, this Court should follow its "traditional deference to the 'two-court rule,'" *United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (citation omitted), and decline review. As this Court has frequently stated "[a] court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1978).[15] Since there has been no "exceptional showing of error," the judgment of the district court, affirmed by the Eighth Circuit Court of Appeals, should remain undisturbed.

Even beyond the two-court rule, the complex remedial situation here should make the Court hesitate to review the district court's fact findings concerning a change in the remedy, because changes in equitable remedies are frequently necessary if remedial goals are to be achieved. *See United States v. Montgomery County Board of Education*, 395 U.S. 225, 234-35 (1969) (in school desegregation cases, remedial orders that are inflexible and rigid are "troublesome"). As this Court has long taught, "[i]n fashioning and effectuating [such] decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Milliken v. Brad-*

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[15] *See also, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-18 n.5 (1985) (noting "reluctance to disturb findings of fact concurred in by two lower courts"); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984) (Court accords "great weight to a finding of fact which has been made by a district court and approved by a court of appeals"); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (same).

ley, 433 U.S. 267, 288 (1977), *quoting Brown v. Board of Education*, 349 U.S. 294, 300 (1955).[16]

The wisdom of these admonitions is illustrated here. The State petitioners never challenged as clearly erroneous the fact finding on which these budget increases were based. While they contested in the district court some of the facts KCMSD and the Jenkins plaintiffs presented, their own expert architect acknowledged at the evidentiary hearing on the Central High School budget that certain costs were not included in the original construction estimate that were essential for completion of the project. J.A. 1146-49; J.A. 1151. While the State complained generally in objecting to the use of the AHERA standard for asbestos abatement that not all of the abatement was necessitated by the disruption of asbestos due to demolition and renovation required elsewhere in the desegregation plan, it failed to produce any evidence identifying any particular portion of the abatement that was unrelated to that disruption and the need to make schools sufficiently safe and healthy to conduct successful educational programs that will draw a desegregated enrollment.

The State petitioners' attacks on the use of AHERA standards for asbestos abatement make clear how far its argument has strayed from the record and logic of the courts below. At the same time that the State petitioners

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[16] *Accord, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971) ("breadth and *flexibility* are inherent in equitable remedies") (emphasis added). The lower federal courts, in considering modifications in desegregation decrees, repeatedly have recognized that the district courts are in the best position to assess the appropriateness of changes in the remedy. *See, e.g., Booker v. Special School Dist.*, 585 F.2d 37, 353 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979) ("the basic responsibility for determining whether . . . and to what extent [a desegregation injunction] should be modified rests primarily on the shoulders of the district court that issued the injunction in the first place"); *Mapp v. Bd. of Educ.*, 477 F.2d 851, 852 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973) ("[a]ppropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court").

criticize the courts below for supposedly adopting as the guideline for the remedy the "virtually limitless" standard of attractiveness to additional non-minority students, they fault those courts for adopting the AHERA regulatory standards for asbestos abatement work. Far from being limitless, the AHERA standards add an objective level of precision to the remedy, so that the school district can measure not whether it has done all of the asbestos abatement it would *like* to do, or that it would be *attractive* to do, but that it *must* do under federal law because it is disrupting asbestos in the course of other work required by the court-ordered plan.

The State's AHERA argument is as illogical as would be a complaint that electrical work performed in the course of the desegregation capital improvements was being done in accordance with the standard required by the city's building code. When the court orders that the constitutional violations that caused the district's schools to "rot[]" be remedied by building a new school or addition, or by upgrading wiring to provide the lighting needed for an adequate educational environment, that work must, of course, meet the applicable building codes. That the work is "up to code" does not mean that the State is required as an obligation under the desegregation plan to bring the KCMSD schools' electrical systems up to the building code; the use of the building code as a measure is a function of the fact that electrical work is being done for other reasons. Indeed, the *reasons* for the work the State does not, and cannot, challenge, having acknowledged the same remedial proposals in its own capital improvements plan. The use of the building code, like the use of AHERA to measure the appropriate degree of asbestos abatement, is the kind of objective measure that the lower federal courts can and should rely on to lend some clarity and objectivity in the shaping of an equitable remedy. The illogical alternative apparently favored by the State petitioners is an order that the KCMSD abate asbestos disturbed as part of the constitutionally mandated desegregation plan capital improve-

ments to some lesser degree than is required by federal law, and by the health and safety needs of KCMSD schoolchildren.

Finally, the issues here are moot, and as a practical matter present no opportunity for the Court to change the course of the Central High School construction or asbestos abatement projects. The new Central High School is now completed. The school opened in September 1991, and whereas it was an all-minority school before it became a magnet, the student body for 1991-92 is 17.5 percent non-minority. This is significant progress, since the existing, all-minority classes of students were not required to leave when the school became a magnet school. The freshman class is 24 percent non-minority, so enhanced desegregation for Central is readily achievable.

Similarly, the $910,224 in additional absestos work for six schools, about which the State complains, has long been completed and paid for. In the desegregation capital improvements program generally, the vast majority of the work has been completed.

Litigants "must have suffered, or be threatened with, an actual injury traceable to the defendant and *likely to be redressed by a favorable judicial decision*" before this Court should exercise its discretionary jurisdiction. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, ——, 110 S. Ct. 1249, 1253 (1990) (emphasis added) (citations omitted).[17] A ruling by this Court would not change the fact that Central High School has been built in accordance with

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[17] This is true because Article III of the Constitution limits the federal courts to adjudicating "actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). In addition, Article III "denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,'" *Lewis v. Continental Bank Corp.*, 110 S. Ct. at 1253, *quoting North Carolina v. Rice*, 404 U.S. 244, 246 (1971), and further limits them to "resolving 'real and substantial controversies *admitting of specific relief* through a decree of a conclusive character." *Id.*, *also quoting Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937) (emphasis added).

the budget increase approved by the courts below, and the work at the schools subject to the asbestos abatement budget increase of $910,224 has been completed.[18]

Needless to say, these issues do not present any conflict among the circuits that requires resolution by this Court, nor do they present any important question of federal law. They concern the process of school building construction and estimating the costs of such construction. The fact findings at issue are backed by the testimony, in affidavits and at a hearing in the case of Central High School, of architects, construction managers and construction cost estimators. They should remain undisturbed by this Court.

II. EVEN IF THE PETITION PRESENTED THE ISSUE OF THE OVERALL SCOPE OF THE DESEGREGATION REMEDY IN KANSAS CITY, THE COURT SHOULD DECLINE REVIEW BECAUSE IT HAS PERMITTED THAT REMEDY TO GO FORWARD WHEN THE SCOPE ISSUE WAS PREVIOUSLY PRESENTED

Despite the fact that the questions presented by the State petitioners raise only the narrow and technical issues described in part I. above, petitioners invite the Court generally to "consider the scope of the ongoing school desegregation remedies" ordered for Kansas City. Pet. at 2.[19] That issue is not properly before the Court

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[18] The State petitioners likely will contend that these issues are not moot because this Court could rule that the State should not have to pay for the budget increases. Such a narrow question of payment allocation is hardly an issue, however, that warrants this Court's review.

[19] The State stresses repeatedly that the overall purported cost of the remedy is "*some $1.2 billion*" and that it "*has actually paid approximately $469 million*" toward the remedy. Pet. at 9 (emphasis in original). These numbers distort considerably what is at issue in the instant petition and the facts regarding the overall remedy. The actual construction cost increase approved for Central High School was $8,231,565, with a 10 percent contingency factor, and the actual cost increase for asbestos abatement at six schools was

because of the narrowness of the State's questions and the rulings actually made by the court of appeals on the two budget change decisions the State petitioners challenge. *See* Sup. Ct. R. 21.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court"); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984).

Even if that decision and the questions presented could somehow be read to implicate larger issues about the scope of the remedy overall, the Court should decline review because it has permitted the remedy to go forward on two previous occasions when review of scope issues was requested by various parties.[20] In 1989, the

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$910,224, with future work likewise to meet the AHERA standards. Even if the petition properly raised issues concerning the overall scope of the remedy, the State's $1.2 billion figure apparently a) compresses about 10 years of capital improvement work and seven years of magnet school and desegregation program costs into one number, b) is based at least in part on maximum *budgeted* figures and not on the actual costs of the work, which have been ascertained on occasion to be lower, and c) includes all the costs paid by the KCMSD from locally generated funds.

[20] The State's rather dramatic recitation of what it characterizes as "the evolution of this expansive remedy" stresses the dollar amounts of each stage of the further development of the remedy, as if to suggest that the costs of the remedy will continue to escalate forever if not halted by this Court. Pet. at 5-10, 16-18, 20 ("the courts in this case have embarked on a remedy that is potentially endless in nature and scope"). In fact, the capital improvements ordered by the courts below are one-time projects to provide schools or to make existing schools suitable for desegregation programs. A very significant proportion of that work is already completed. With respect to the magnet school plan, the KCMSD has made a commitment to the district court that after the initial cycle of implementation and magnet school conversions ends at the conclusion of the 1991-92 school year, the cost will begin to drop because start-up equipment, supplies and training necessary to begin these programs will be in place. In short, there is no basis to believe that any party to this case, or the courts below, intend these decrees to operate "in perpetuity" in violation of this Court's teaching in *Board of Education of Oklahoma City Public Schools v. Dowell*, —— U.S. ——, ——, 111 S. Ct. 630, 637 (1991).

State petitioners sought review of the scope of the desegregation orders' Long-Range Magnet School Plan and capital improvements plan, arguing specifically, as they do in the instant petition, that a remedy based on the duty to attract additional non-minority students to a school district and to improve a school district to a level of comparability with surrounding districts is beyond the power of a federal court remedying an intradistrict constitutional violation. *Compare* Petition in Nos. 88-1150, *et al.* at i ("Whether a federal court, remedying an intradistdict [school segregation] violation . . . may a) impose a duty to attract additional nonminority students to a school district, and b) require improvements to make the district schools comparable to those in surrounding districts") *with* Petition at issue here, No. 91-324 at 18 ("By establishing as a primary remedial objective the goal of attracting additional nonminority enrollments to the school system, the lower courts in *Jenkins* have defined this intradistrict remedy in terms that exceed the constitutional mandate.").

On April 24, 1989, this Court declined to review the scope of the remedy issue presented by the State in Nos. 88-1150, *et al.* 490 U.S. 1034 (1989). Moreover, the Court also declined to review the original petitions for certiorari filed by KCMSD and the Jenkins plaintiffs in 1987, which argued that a mandatory interdistrict remedy was justified based on the record before the district court in the liability case. *See* 484 U.S. 816 (1987). The State bypassed the opportunity to cross-petition to challenge the basic structure of the original remedy, which called for educational programs, magnet schools, capital improvements, and desegregative voluntary interdistrict transfers.

The result has been that progress has continued in the implementation of the overall remedy right up to today. The 1991-92 school year, now underway, is the final year for conversion of schools to magnet schools under the first six-year cycle of the Long-Range Magnet School

Plan. Accordingly, all of the KCMSD high schools and middle schools have been converted to magnet schools, along with 35 elementary schools. This process has included training of existing staff and hiring of specialized staff in the magnet themes, the purchase of equipment and supplies to support the specialized programs that the themes require and, under the capital improvements plan, the construction or renovation of specialized facilities to accommodate specialized classes. Indeed, under the capital improvement plan, seven new school buildings are completed and already housing students in magnet school programs. Six more new school buildings are under construction and are scheduled for completion during the 1992-93 school year. Dozens of other school building renovation projects are completed or will be completed during the current school year.

Simply put, the courts below have been on the course of supervising the implementation of the remedy for over six years, during which this Court declined or was not asked to review challenges to the scope of that remedy. It would be extremely disruptive to the implementation, and no doubt could set the KCMSD on an even longer course toward unitary status, if the Court entertained now what at least some passages in the State's petition describe as a global review of the remedial standards and particular remedy components adopted by the courts below.[21]

In an effort to raise some question of federal law that might make these issues appear worthy of review

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[21] Needless to say, review of the overall remedy, after over six years of judicial proceedings and implementation, would raise many of the same questions described at pages 18-19 above concerning deference to the fact findings of the courts below. The remedial proceedings have been the subject of weeks of major hearings and several smaller hearings per year, involving expert as well as lay testimony on educational and construction issues. The parties have filed cabinets full of motions papers and exhibits during the remedial proceedings, and the district court has entered over 160 substantive orders.

by this Court, the State petitioners suggest that "[t]he grant of certiorari in this case would allow this Court to establish clearly that the permissible scope of a court-ordered desegregation remedy is to be determined by reference to the factors identified in *Green v. New Kent County School Board*, 391 U.S. 430 (1968) . . . ." Pet. at 16. Certainly no such clarification is needed. For over 20 years, the lower federal courts have been supervising the development and implementation of desegregation plans with reference to this Court's directives in *Green*, reiterated last Term in *Board of Education of Oklahoma City Public Schools v. Dowell*, —— U.S. ——, ——, 111 S. Ct. 630, 638 (1991). The district court here relied on *Green*, among other decisions of this Court, as the guideline for the overall structure of the remedy. 639 F. Supp. at 23. The State petitioners fail completely to explain how the Central High School and asbestos decisions run afoul of *Green*, since both bear directly on the "facilities" factor cited in *Green* as part of "every facet of school operations" that must be considered in formulating a desegregation remedy. *Green*, 391 U.S. at 435.

The State petitioners also ask the Court "to specify that the federal courts' mandate to determine whether the vestiges of *de jure* segregation had been eliminated 'as far as practicable,' *Dowell*, 111 S. Ct. at 638, is to be determined by those same *Green* factors." Pet. at 16 (footnote omitted). The Central and asbestos issues simply do not raise *Dowell* issues of when stable desegregation, to the extent practicable, can be said to have been achieved. No party in this case has made a request that the district court determine whether unitary status has been achieved in the KCMSD, and the State makes no representation that the KCMSD is unitary. Such a determination obviously is premature in the midst of implementation of this desegregation plan. Without a determination by the district court, after a hearing and through proper fact findings, as to whether all vestiges of segregation have been removed to the extent practi-

cable, there is no *Dowell* issue to be considered by this Court.

For the same reasons, the issues presented by this petition do not raise any question of whether some or all "largely-minority schools" can remain in a unitary school district. Pet. at 18. The petition does not define what a "largely-minority school" would be in Kansas City, and the courts below have not opined on whether it is practicable for all schools in the KCMSD to have desegregated enrollments, or whether some racially identifiable schools will be permitted to remain at the termination of the remedy. Indeed, no party has sought a ruling on that issue, which is unsurprising since it would be premature in the midst of implementation of the remedy, while desegregative gains are still being made, to determine whether some schools as a practical matter will remain racially identifiable. Certainly the question of whether racially identifiable schools will remain in the KCMSD is not implicated in issues of the proper budget for construction of Central High School and the proper amount of asbestos abatement to be done during desegregation capital improvements.

In fact, the issue of racially identifiable schools may never need to be reached, because as the KCMSD magnet schools come on line, they are slowly winning the desegregated enrollments that are the goal of the plan. In 1985, Judge Clark found that 19 of the 50 elementary schools had 90 percent or higher black enrollment, as did three of the eight junior high schools and three of the eight high schools. By the 1991-92 school year, 11 fewer schools were at that level: 9 fewer elementary schools and 2 fewer middle and high schools. In the 1991-92 school year, almost 1,700 new non-minority students, who previously had attended private or suburban schools, were attending school in the KCMSD. Of that number, over 900 were new to the KCMSD in the fall of 1991. A solid

foundation of desegregative progress and of remedying the harm to minority students has been laid.

There can be no doubt that such voluntary desegregation costs more to achieve than the type of mandatory busing that the State proposed and the district court rejected in 1985. Voluntary desegregation through magnet schools and parent choice, although it requires an investment to make the schools worth choosing, avoids the coercion and instability inherent in busing-only remedies. The district court here so found back in 1985. 639 F. Supp. at 35-36. For over six years it has been on a course of making a voluntary remedy work in a school district in a state of "decay" and declining educational achievement. As we are finally turning the corner on desegregative progress, that remedy should not be disturbed.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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